1951

File No. O. Misc/51

Legal Department

A BRANCH

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Subject:— PQUE.

Miscellaneous Opinions given

in the year 1951

File No. O Misc/51

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1951

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Subject:— page

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Legal Department File No. O.Misc./1951.

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Legal Department.

24186 dated 1 - 12 - 1950.

Prisoner Pheru Jesaram Sangtani, who has been sentenced to death and who has appealed to the Supremem Court requests that his name may be changed to Narendra Jesaram Rajan and that it may be ublished by Govt. H.D. states that in the records of the appeal to the Supreme Court and in the Police records his old name is shown and it is doubtful whether it would be legally feasible now to change his name in all the judicial records. The R.L.A. is requested to advise whether there is any objection to allow the prisoner to change his name and, if so, to indicate the procedure that will have to be followed before the name is changed.

EKN.22/6/ Sd/

Office of the R.L.A.

Change of name by prisoner.

Although a man may change his name, in the special circumstances of this case such change will serve no useful purpose but will on the contrary cause confusion. Government may therefore decline to entertain prisoner's prayer for change of name, in this case.

Sd/ P.M.Lad

Re-membrancer of Legal Affairs.

U.R. to H.D.No.6, dated the 2nd January 1951.

ZKN.22/6/

Office of the R.L.A.

Ordinarily, there can be no objection to recovering arrears of taxes levied and recoverable before the Ambaliara State was integrated with the Bombay State. But this power can be exercised only if the taxeswere levied under the statutory provisions as existing in the Ambaliara State before it was integrated with the Bombay State. It appears the fine of Rs.28,981-4-8 was levied under a Jahirnama issued by the Thakoresaheb of Ambalira for default of the cultivators to conform to the orders contained therein in respect of raising food grains and money crops. That Jahirnama had the statutory effect in asmuch as the Thakore had the legislative power. Consequently there appears no legal objection to recovering this fine from the land-holders. Whether it would be expedient to make this recovery is a question for the administrative Department to decide.

2. So far as vighoti is concerned, it appears from Revenue Department office note at page 9 that it is in the nature of land revenue. If so, obviously it was lawfully recoverable and consequently there would be no legal objection to recovering it now from the land-holders. The varoes appear to be an obnoxious tax. Attention in this connection is invited to section 11 of the Bombay Tenancy and Agricultural Lands Act,1948, whereunder varo has been abolished. Consequently it would not be desirable to recover this tax.

Sd/ P.H.Lad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.1431, dated 23rd January 1951.

EKN.21/6/

Office of the R.L.A.

In this case Lt.F.R.Chavan has mpassed a possessory Mortgage bond to the Commandant, Kolhapur State Forces on the 10th of December 1948, in respect of his bungalow called "Narsinha Lodge" situate in Kolhapur City as security for a loan of Rs. 15,000/- given to him by the mortgage. The terms of the mortgage bond are briefly these:-

The mortgage was put in possession in lieu of interest, and a rent note obtained by the mortgage from a tenant in January 1948 was assigned to the mort-gagee in taken of delivery of possession. The Mortgagor was to pay all Municipal taxes an expenses of ordinary repairs. The mortgage debt was repayable within one month. If it was not paid the mortgagee was given the right of private sale under section 69 of the Kolhapur Transfer of property Act. It was also open to the mortgagee to bring the property to sale through a Civil Court. There is no feferences in the mortgage bond to any previous incumbrances.

It is not clear whether any rent has been received from the tenant whose rent note has been assigned to the mortgagee. Nothing seems to have been paid by the mortgagor so far towards the repayment of the mortgage debt.

It seems that there are othr prior incumbrances on the mortgaged property amounting to Rs.50,000/- or so in favour of the Commercial Bank of Kolhapur, and the Bank of Kolhapur Ltd. The present value of the property, called "Narsinha Lodge" has not been ascertained. As the incumbrances in favour of the Kolhapur Bank and the Commercial Bank are of a prior da-te they will have to be paid off first out of the sale proceeds of the property. The present

mortgagexxxxxxxx is a third mortgage as stated in clear terms by the mortgagor in his letter at page 161. It would not be possible therefore to divide the sale proceeds of the mortgage property rateably between the Government and the two banks. The two Banks will be entitled to priority, as their incumbrances are of an earlier date.

It is difficult to see how the mortgage can be realised by process under the Land Revenue Code. There is no term or condition in the mortgage and authorising the mortgagee to recover the debt as if it was an arrear of Land Revenue. The mortgage bond only authorises a private sale. Such private sales were allowed under the special provisions of section 69 of the Kolhapur Transfer or Property Act which was in force at the date of the mortgage. That act is now repealed and the Ordinary Transfer of Property Act applicable to the rest of the Province is extended to Kolhapur. However, as the right of private sale was created under the Old Kolhapur Act which was in force at the date of the mortgage, that right would still box available to the mortgagee. But the mortgage debt cannot be recovered by any process under the Land Revenue Code as if that ebt was an arrear of Land Revenue.

Alternatively the mortgagee has a right to continue in possession indefinitely and to appropriate the rent towards interestx.

d/ J.R.D.

forRemembrancer of Legal Affairs.

U.R. to P.& J.D.No.113-Confl. dated 5th February 1951.

EKN.22/6/

Legal Department.

The order of the High Court dated 6-4-1950 on the petition of the Government of Bombay for being discharged from the office of the trustee of the Sultan of Shehr and Mokalla Trust Fund directs the Government of Bombay to hand over to the Financial Secretary to the Government of Aden as the new trustee of the Fund the securities in their hands or under their control. The securities consist of 3½ conversion loan 1946 for Rs.11,14,500/-. The Manager of the Reserve Bank of India reports in his letter at page 315 ante that the Securities are held by them on behalf of the Civil Secretary to the Government of Aden. The transfer of the securities has been directed by the High Court Order. The question now is only of giving effect to that order or executing the same. No question of law appears to be involved. The formal order of transfer may be in the form of a Government Resolution.

Sd/ J.R.D.

Additional Secretary to Government.

U.R. to P.& S.D.No.5007, dated the 17th Feb. 1951.

EKH.22/6/

Le al Department.

It appears that the old stock of Gujarati and Marathi Readers III, edition first, was entrusted to Shri Dhawale of the Karnatak Printing Press for sale and that stock has still remained unsold and Shri Dhawale has not cared to credit the amount to Government in respe of that stock. Government has given the contract to print the second edition of Marathi and Kannada Readers III to the Associated Advertisers, Printers Limited, Bombay, etc. for the year 1951-52 and the copies of this second edition are now ready. As the Director of Public Instruction proposes that the old stock lying with Shri Dhawale of the Karnatak Printing Press should be purchased by Messrs. Associated Advertisers and Printers, a direction is proposed to be issued to Shri Dhawale to hand over the unsold stock to Messrs. Associated Advertisers and Printers. The main reason for such a state being that the price of the old stock per copy is 11/- annas, while that of the second edition per copy is 10/- annas and consequently the old stock requires to be exhausted first before the new stock is put on the market. The Remembrancer of Legal Affairs is requested to advise whether there would be any legal objection to issuing a direction to the Karnatak Printing Press to handover the old stock, to Messrs. Associated Advertisers and Printers Ltd., Bombay.

2. It appears from the letter of Shri Dhawale dated 23rd March 1950 that he proposed to Government to grant him the rights of distribution of the Gujarati and Marathi readers III on the same terms and conditions which were made applicable in the case of Primers I and II so that it would facilitate the prompt and expeditious distribution of the copies of the Reader III absolving the Government from the onerous task of publicity and

distribution. By their letter No.7599/1422/H dated 14th April 1950 Government accepted the offer of Shri Dhawale and entrusted him with the work of distribution of copies of Gujarati and Marathi Readers III subject to certain conditions, one of which was that Shri Dhawale should account for all books and the fixed price minus 15 percent discount. It is clear from these two letter of offer and acceptance that Shri Dhawale was appointed as an agent for the distribution of copies of the Gujarati and Marathi Readers III subject to the payment of a discount of 15 per cent. In reply to Government's letter dated 30th January 1951, Shri Dhawale has promised in his letter dated 9th February 1951 to credit the net amount due in respect of the copies of Marathi and Gujarati Readers III in the course of the next week. It appears, he has not so far done it. In his letter dated 2nd March 1951 the Director of Public Instruction states,"It seems Dhawale is a hard nut to crack. He is neither paying us according to the contract for the stock nor is he releasing to the Associated Advertisers and Printers Ltd. according to the arrangement settled. A peremptory order from Government to Shri Dhawale is necessary for handing over the entire stock to Shri Dalal or to make immediate payment for it." It is clear from this correspondence that Shri Dhawale being entrusted with the distribution of the old stock was acting merely as an agent of Government. Since he appears to be unwilling either to pay the amountor to hand-over the stock undisposed of, the only course open to Government is to terminate the agency and to call upon him to account ~~xxxxxx~~ for the amount realised by him by sale and to hand over theremaining stock. Unfortunately, no regular agreement has been executed between Government and Shri Dhawale and consequently, even after terminating the agency Government will have to approach the Civil Court for relief in case he does not pay the amount and to handover the stock.

It appears, therefore, desirable to settle the matter amicably with Shri Dhawale and to induce him to handover the stock to the Associated Advertisers and Printers Ltd. and to pay the balance. If he is unable to pay at once he may give an agreement for the payment of the amount, with proper sureties.

Sd/

Additional Secretary to Government.

U.R. to E.D.,No.251-Confl, dated the 8th March 1951.

EKN.22/6/

Legal Department.

Teachers in non-Govt Secondary Schools-Conditions of services.

The education Department proposes to issue the draft Government Resolution at pages 11.18 ante and H.C.M. desires that the R;L.A. should advise as to condition (8) in the Government Resolution and generally as to the other conditions in that Government Resolution.

It appears that Government has prescribed the conditions of service in respect of teachers in non-Government secondary schools providing for the discharge of temporary teachers on one month's notice and of permanent teachers, i.e., teachers with over two years service, on three months' notice terminating on the last working day of the school term, except that no such notice is necessary where a teacher is guilty of grave insubordination and misconduct. It appears that managements or some schools have misused the power of terminating the services of permanent teachers on three months' notice and with a view to safeguard their interests Government proposes to prescribe conditions (1) to (10) in para.1, conditions (i) to (vi) in para. 2 and conditions (a) to (e) in para.3. of the draft Government Resolution. Of these conditions, conditions, (1) to (10) in para. 1 of the draft Government Resolution require to be closely scrutinised. Condition (1) says that no management shall discharge or reduce a prmanent teacher, i.e., a teacher with continuous service of more than two years under the management, except on mutual agreement or after following the procedure prescribed below. Condition (2) requires the management to give the teacher an opportunity to put in a written defence. Condition (3) requires the management to consider the explanation before deciding upon the termination of the services of the teacher or the reduction of his pay and the record the reasons.

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A copy of the order is also required to the furnished to him. Under condition (4) Government can suo motu require the management to dishharge from service or reduce the pay of a teacher or it can also do so when it is satisfied that the management has failed to inflict adequate punishment on a defaulting teacher but Government will have to furnish the teacher concerned with a brief statement of the grounds on which it proposes to take action and give him an opportunity to put in his defence. Condition (5) provides that, except in causes where a teacher discharged shall be entitled to a notice of three months from the date on which the grounds of discharge are communicated to him under (3) or (4) above or one month from the date of the order terminating his services referred to in para. (3) or (4) above whichever is longer. Condition (7) provides for an appeal against the order of discharge of reduction. Condition (8) provides that onreceipt of the application, the Educational Inspector or Inspectress shall call for the records of the case from the management and after giving a personal hearing to the management and to the teacher concerned where necessary, pass an order whether the order of the management was propor or requires any modification and communicate the order to the management and to the teacher. The Educational Inspector or the Inspectress as the case may be shall also direct in the order that, if the management fails to carry out the order so passed, it shall pay to the teacher as compensation such amount not exceeding six month's salary, inclusive of allowances, the teacher was receiving just before discharge as may be considered reasonable, having regard to all the circumstances of the case, exclusiv of any notice pay due to the teacher. Conditions

(9).....

(9) and (10) are not very important.

In Jacob Elias Sassoon vs. Dossa Kalian (1911, Indian Cases 757 (Sind(it was held: " In actions for wrongful dismissal, the general rule is that the plaintiff may recover damages for the whole unexpired period of service. Where, however, it is provided that the agreement may be terminated at an earlier date by giving previous notice, the parties may reasonably be held to have contemplated the time limit of the notice as attaching to any liability for wrongful termination of the agreement. In such cases the damages for wrongful dismissal should be limited to the period of notice required under the agreement." Government has already prescribed as one of the conditions of service that three months notice would be necessary for terminating the services of permanent teachers. If so, even if a permanent teacher is dismissed wrongfully after due notice of three months as provided in the conditions, the teacher so dismissed or discharged can have no grievance at all. If this proposition is accepted - and I think it has to be accepted- the conditions proposed to be prescribed by Government about the enquiry appeal and power of Government to issue directions will not arise at all. Condition (4) appears to vest in Government the power of dealin with the teachers directly or through the management. This condition would not appear to be valid because the teachers are primarily to servants of the management and that being so it is for the management to deal with these teachers and not for Government. Government may prescribe a condition that it may suggest to the management to take action against the teacher. Condition (5) has not been properly worded. This requires further elucidation. Condition (8) appears to be objectionable. If a teacher has been wrongfully dismissed or discharged from service, all that he would be entitled to would be his salary for the notice period. Any direction

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from Government that the management would be liable to pay the teacher as compensation such amount not exceeding six months' salary, etc. exclusive of any notice pay due to the teacher would not be lawful.

There is nothing objectionable in the conditions prescribed in paragraph 2 and 3 of the draft Government Resolution.

Sd/ J.R.D.

Additional Secretary to Government.

U.R. to E.D.No.2525, dated the 9th February 1951.

EKN.22/6/

7176/10-4-51.

Submitted with reference to P. & S.D. office note at p. 335 ante. This is in connection with the transfer of the property of the Shehr and Mokalla Trust Fund to the Financial Secretary to the Govt. of Aden. For the Facts of the case attention is invited to paras. 2 & 3 of office note underlying Addl. Secy's opinion No.3007, dated 17-2-1951 at slip A below. In that opinion it was pointed out that no question of law was involved in executing the order of the High Court dated 6th April 1950 and that a final order of transfer could be issued in the form of a G.R. transferring the securities to the Financial Secy. to the Govt. of Aden. The draft G.R. is shown to the H.L.A. before issue. The draft G.R. at pp. 337-340 which mentions the full facts of the case is generally in order. The papers may be seen and returned to the P. & S.D.

DS.(Civil) R.T.K. 18/14

Additional Secretary Sd/

Seen and returned.

Sd/- B.D-M.

Additional Secretary to Government.

U.R. to P. & S.D.No.6255, dated 18.4.1951.

EKN.22/6/

Legal Department.

The Bombay Irrigation Act, 1879.

Section 70.

The Rules for the supply of filtered and disinfected water from the Bombay Government water works at Kolhapur are clearly non-statotory rules, although they seem to have been made on the lines of the Rules sanctioned by Government by Government Notification, Public Works Department No.401/27, dated the 27th July 1936 issued under section 70 of the Bombay Irrigation Act, 1879. It is true that there is no objection to framing non-statutory rules for the supply of water by Government to private consumers; but these rules would only constitute conditions attached to an agreement between Governement and the consumer, and for that purpose an agreement should always be taken from the consumer embodying these rules as conditions for the supply of water. It may, however, be noted that for the breach of any of these rules no criminal action can be provided for, for as advised by the R.L.A. in his opinion No.9463, dated the 3rd November 1941, no offences can be created by non-statutory rules. Further these rules also cannot be caried or amended during the period of the contract. Rule 3, sub-rule (2), rule 21 and rule 23 of the Rules for the supply of filtered and disinfected water from the Bombay Government water supply at Kolhapur will have, therefore, to be deleted.

Sd/ R.T.K.

For Additional Secretary to Government

U.R. to P.W.D.No.8283, dated the
25th May 1951.

EKN22/6/

Office of the R.L.A.

The Indian Insurance Companies' Association Pool refused to entertain the claim on two grounds.

(i) that there was considerable overloading in respect of all the five shipments concerned, far in excess of what an insurer might reasonably allow and

(ii) that apart from the question of overloading, according to the tindals protests concerning 'Daria Dolat', 'Labhasavai' and 'Nasibsavai' the vessels had stranded or run aground following which part of the consignment was jettisoned in each case.

Subsequently the Pool withdrew contention (i) above and as a special case decided to allow the claim amounting to Rs.3011-4-0 for 36 tons and 10 cwt. at Rs.8.-8-0 per ton in respect of the cargo jettisoned from the country-crafts 'Dhanpasa' and 'Laxmipasa' which were concerned with excessive overloading only and unlike the other three, had not stranded or run aground. Clause 10 of the insurance policy provides thatshould the vessel run aground or strand the liability under the policy shall cease from the moment of running aground or stranding except in respect of total loss by total loss of the craft. The loss is clearly outside the scope of the policy and the Pool are justified in refusing to entertain the balance of claim for Rs.7406-6.0 in respect of the cargo jettisoned from the three countr,-crafts which had stranded on run aground. The question for consideration is whether the Cement Marketing Company of India Ltd. who had consigned the cargo are in any way responsible to make good the loss.

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It is a well-settled rule that where goods are ordered to be sent by a carrier the moment the goods are delivered to the carrier it operates as a delivery to the purchaser. It is however the seller's duty to do whatever is necessary to secure the responsibility of the carrier for the safe delivery of the goods and to put them in such a course of conveyance so that in the case of loss the buyer might have his remedy against the carrier. If the route involves sea-transit it is also the seller's duty to give the buyer sufficient notiece to enable the latter to insure the goods. (Section 39, Indian Sale of Goods Act,1950).

It is not known whether the three country-crafts ran ground due to any default on the part of the carrier. If so the carrier would be liable for the loss. It is however, difficult to hold the Cement Company responsible merely on the ground of overloading when the Pool have waived their objection in that behalf.

Sd/ J.R.D.

Remembrancer of Legal Affairs.

U.R. to L.& H.D.No.10649, dated the 5th July 1951.

EKN.22/6/

Office of the R.L.A.

Pransukhlal Mafatlal
Hindu Swimming Bath.
Resumption of leased land.

Seen and returned.

In view of the fact that the licensees failed to erect the buildings within the extention of time would be granted and made no attempt to secure the building materials, there would be no legal objection to Government resuming the land under clause 5(b) of the agreement. But it may, however, be added that before resumption is ordered, in accordance with the principle under section 114A of Transfer of Property Act, notice will have to be given stating expressly the breach of the condition and as the breach is capable of being remedied, prescribing reasonable time for the fulfilment of the condition. After such notice is given, the rent should not be accepted as such acceptance would amount to a waiver.

Sd/ J.R.D.

Remembrancer of Legal Affairs.

U.R. to R.D.No.17097, dated the 26th October 1951.

EKN.22/6/

Legal Department.

Dismissed Secondary school Teachers- ----- Payment of salary for broken period together with interim relief and D.A.

The view taken by the Director of Public Instruction on both the questions is correct. Interim relief, as stated by the Director of Public Instruction, is to all intents and purposes a part of the pay, for it was directed to the paid in the form of temporary additional pay pending the general revision of pay scales (see the accopaniment to Government Resolution, Education and Industries Department No.6803 dated 26th April 1949). If duty has been performed by the Servant he is certainly entitled to the remuneration including such additional pay granted by way of interim relief. Consequently, all these teachers would be entitled to the interim relief and the fact that they were subsequently dismissed from service for misconduct would not forfeit their claim for such interim relief for the period of service.

In Ramji Manor v. H.D. Little (1873, 10 Bombay High Court Report, 57) it was held: "Where a servant who was engaged by the month served from 1st November to 3rd December 1872 and left his master's service on the 4th December without giving notice, the servant was entitled to be paid his wages up to the end of November but forfeited thewages payable to him in respect of his December services." This decision establshes the proposition that a servant who was left the service of his master without proper notice would not be entitled for his wages for the broken period. In the present case the teachers did not leave the service of the Union High School but were dismissed. Consequently the aforesaid principle would not apply and the teachers would be entitled to their salary up to the date of their dismissal, that is to say, even for the broken period.

Sd/

Additional Secretary to Government.

U.R. to E.D.No.17099, dated the 26th October, 1951.

EKN22/6/

Office of the R.L.A.

By this memorandum dated 17th October 1946, the Divisional Forest Officer, East Thana, asked the Rnage Forest Officer, Dhasai, to report whether the Guard A.G.Kulkarni on leave was willing to go on compassionate pension of Rs.5-7-9. Shri A.G.Kulkarni in reply stated that he was willing to take whatever pension could be granted to him as usual. The question raised for the R.L.A's consideration is whether the reply of Shri A.G. Kulkarni can be construed as a resignation of his post.

Reading the memorandum of the Divisional Forest Officer with the reply of Shri A.G.Kulkarni, it is apparent that Shri Kulkarni never intended to resign hisoffice. The reply given by him would ~~in~~ clearly indicate that he was prepared to go on compassionate pension but that such compassionate pension should be determined according to rules. In other words, it meant that the compassionate pension of Rs.5-7-9 as offered by the Divisional Forest Officer in his memorandum was not accepted by Shri A.G. Kulkarni as correct and he ~~desire~~ desired that it should be determined according to the rules. A resignation of an office to be complete implies the consent of the incumbent (See Iyer's Law Lexicon p.1121). The reply given by Shri Kulkarni cannot be construed as consent on his part to resign. Consequently, Shri A.G.Kulkarni cannot be regarded as having validly resigned his office.

Sd/ J.R.D.

Remembrancer of Legal Affairs.

U.R. to A.& F.D.No.19545 dated, 5th December 1951.

EKN.22/6/

OFFICE OF THE R.L.A.

Compensation to Secondary School Teachers. Additional Secy's opinion No.15807. dated 5-10-51.

The Rules contained in Government Resolution, Education Department No.SSN.1851, dated the 6th November 1951 are in the nature of executive Instructions to the managements of schools. Unless the schools adopt them specifically as binding conditions of contract between themselves and the teachers those rules alone would not entitle the teachers concerned to sue the managements for compensation on their basis. The teachers resorting to Civil Courts for redressing any worongs done to them by way of wrongful dismissal would be entitled to such damages as are admissible under the general law or any special conditions of contract governing the parties. This right it appears cannot be affected even if Government pays them the amount of compensation admissible under these rules. The Court may, however, take into consideration the payment made by Government in assessing damages.

Sd/ J.R.D.

Remembrancer of Legal Affairs.

U.R. to E.D.No.19668, dated the 7th December 1951

EKN.22/C/

Office of the R.L.A.

Appoint of Resident Magistrates.

In the public notice which was issued by the Bombay Public Service Commission on the 4th October, 1950 on the requisition of Government, one of the qualifications for candidates for the appointment of the Resident Magistrates was stated to be that he should ordinarily be an advocate or pleader with at least 5 years' practice in a civil or cirminal court. The qualifications specified in the notice were not in pursuance of any statutory provision. Neither the Criminal Procedure Code, nor the Constitution has so far provided that a magistrate shall have any particular or specified qualifications. A Police Prosecutor, though a graduate in law, cannot be considered as a practising pleader or advocate. He is a Police Officer who is entitled to conduct prosecutions under the orders of Government (see 37 Bom.L.R.968). This is the practice followed in the Bombay State proper and presumably it was so in the former kolhapur State. Both Shri Wal-awalkar as well as Shri Chitnis cannot therefore be held as practising advocates or pleaders when they were working as Police Prosecutors. But that circumstance would not in law make them ineligible for being appointed as Resident Magistrates. Even the public notice requires that a candidate should ordinarily be an advocate or pleader of 5 years' standing. If Government in consultation with the Public Sergice Commission agrees that in the cases of Shri Walawalkar and Shri Chitnis, this particular condition should be waived having regard to their experience as Police Prosecutors, there would be no legal bar toldo so. The question raised is purely an administrative one and is not a question of law.

Sd/ J.R.D.

Remembrancer of Legal Affairs.

EKN.22/6/ U.R. to H.D.No.1054,Confl, dated the 19th December,1951.